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MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-1365

PALO ALTO TENANTS UNION and TERRY KARL,
Petitioners,

vs.

PALO ALTO CITY MANAGER, CHIEF OF POLICE, and CHIEF BUILDING INSPECTOR, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court
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PALO ALTO TENANTS UNION and TERRY KARL,
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PALO ALTO CITY MANAGER, CHIEF OF POLICE, and CHIEF BUILDING INSPECTOR, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioners, Palo Alto Tenants Union, an unincorporated association, and Terry Karl, individually and on behalf of all others similarly situated, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 13, 1973.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals appears at 487 F.2d 883 (9th Cir. 1973), and as Appendix A hereto. The memorandum opinion and order of the District Court appears at 321 F. Supp. 908 (N.D. Cal. 1970), and as Appendix B hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on November 13, 1973, affirming the order of the District Court denying petitioners the injunctive and declaratory relief they sought. This petition for writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether Palo Alto zoning ordinances violate the due process and equal protection clauses of the Fourteenth Amendment by forbidding more than four unrelated persons to live together in the R-1 zones, while permitting families of unlimited size *plus* three unrelated persons to do so?

STATUTES INVOLVED

The municipal ordinances involved are Palo Alto Municipal Code §§18.04.160, 18.04.210, 18.12.020, and 18.88.050, which are set forth in Appendix C hereto.

STATEMENT OF THE CASE

A number of living groups each composed of more than four persons unrelated by blood, marriage, or legal adoption reside in single-family dwellings within R-1 (single-family residence) zones in Palo Alto, California. The individual petitioner is such a person, and many others are members of petitioner Palo Alto Tenants Union. These living arrangements are forbidden by the zoning provisions of the Palo Alto Municipal Code involved in this case, and the respondents are charged with their enforcement.

Petitioners brought civil rights action under 42 U.S.C. §1983 and 28 U.S.C. §§2201, 2202 in the United States District Court for the Northern District of California on behalf of themselves and all others similarly situated requesting preliminary and final injunctive relief against enforcement of these ordinances and a declaration of their unconstitutionality, on the grounds that the ordinances violated the equal protection and due process clauses of the Fourteenth Amendment by prohibiting petitioners from living in their homes for the sole reason of their relationship to each other, by penalizing petitioners' fundamental constitutional rights of privacy and free association absent a necessary relationship to a compelling governmental interest, by penalizing an overbroad class with respect to the mischiefs sought to be prevented and since less restrictive alternatives are easily available and in existence now to prevent these mischiefs, and by bearing no rational relationship to any legitimate governmental interest. The ordinances permit any family related by blood, marriage, or legal adop-

tion, no matter how large or how many cars, dogs, fire hazards, etc., to reside in single-family dwellings in the R-1 zones that comprise nearly all of residential Palo Alto.

The District Court found that strict equal protection tests were not warranted and that the ordinances bear a rational relationship to the governmental purposes of controlling population density (although no such control is imposed upon "related" families), noise, traffic, and parking problems (although "related" families with teenage children present problems as bad as, or worse than, those presented by many "voluntary" families), and preserving the rent structures of these zones (which the District Court held "might" provide a rational basis for the challenged classification). 321 F. Supp. at 912 (Appendix B). The District Court's decision was affirmed in a per curiam opinion by the Court of Appeals for the Ninth Circuit. 487 F.2d 883.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN BORAAS v. VILLAGE OF BELLE TERRE, 476 F.2d 806 (2d Cir. 1973), AS TO WHETHER A MUNICIPAL ZONING ORDINANCE FORBIDDING LIVING GROUPS ABOVE A CERTAIN SIZE FROM RESIDING IN SINGLE-FAMILY HOMES SOLELY BECAUSE OF A LACK OF LEGAL RELATIONSHIP AMONG THE MEMBERS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The Court of Appeals for the Second Circuit in *Boraas v. Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973), struck down on equal protection grounds a municipal zoning ordinance forbidding unrelated groups of more than two persons from residing in single-family dwellings. In the instant case, the court below sustained the validity of an almost identical ordinance forbidding more than four unrelated persons from inhabiting a single-family dwelling.

This conflict justifies the grant of certiorari in this case to review the judgment below.

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2. THIS CONFLICT AMONG THE CIRCUITS INVOLVES SIGNIFICANT AND RECURRING PROBLEMS OF WIDESPREAD IMPORTANCE WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT, AND IT IS NECESSARY TO A COMPREHENSIVE RESOLUTION OF THESE ISSUES IN TERMS OF CONCRETE FACTS TO GRANT THE WRIT IN THE INSTANT CASE.

This Court has recognized the importance of the issues involved by noting probable jurisdiction in the *Boraas* case, 42 U.S.L.W. 3226 (October 15, 1973).

The fact that the instant case, and the *Boraas* case, as well as *City of Des Plaines v. Trottner,* 34 Ill.2d 432, 216 N.E.2d 116 (1966) (striking down on state grounds a very similar ordinance), have been litigated so extensively attests to the widespread occurrence both of ordinances of this type and of groups desiring strongly to live together in single-family homes (as opposed to apartments, rooming houses, and the like). Further, the record in this case demonstrates that within Palo Alto a large number of living groups exist in apparent violation of the ordinances involved in this case. The frequency of such ordinances and of such living groups bespeaks the importance, both to the individual rights and to the rights of municipalities, of the issues involved in this case. The relative rights should be determined by this Court broadly, to make unnecessary repeated litigation of the same issues.

The court below purported to distinguish the decision of the Second Circuit in *Boraas* on the ground that in the instant case there was evidence that the *average* family size in Palo Alto approximated the *maximum* number of unrelated persons permitted to live in single-family homes under the ordinances, whereas in *Boraas* there was no such evidence. Appendix A. This seemingly ignores the obvious fact that since the average family size is roughly four persons, a great number of families must necessarily have more than four members. Further, a family is permitted to live with *three additional unrelated persons* under the Palo Alto ordinances, which thereby equate a family of whatever size with *one* unrelated person.

Such an ordinance can scarcely be justified as an effort to control population density, as the court below attempted to do.

Finally, the writ should issue in the instant case to forestall litigation concerning the distinction between the instant case and the *Boraas* case attempted to be drawn by the Ninth Circuit. The narrow area should be decided in the context of concrete facts presented by the two cases, in a fashion making it unnecessary to litigate slight distinctions in the terms in which such ordinances are drawn.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this proceeding.

Respectfully submitted,
NORTON TOOBY,
PAUL N. HALVONIK,
Counsel for Petitioners.

Dated: February 7, 1974.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Palo Alto Tenants' Union, an unincorporated association, Sherry Black, Marshall Hopper, Max Schling III, individually and as Guardian ad Litem for Wayne Moore and Frederick Dodsworth, minors, Billie Larmer, individually and as Guardian ad Litem for Elizabeth Keri Larmer, a minor, Robert Gilmer, Nancy Oswald, Amy Lewis, Richard Stewart, Peter Ober, Richard Greenspan, and Terry Karl, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

vs.

George Morgan, Palo Alto City Manager, William Hydie, Palo Alto Chief of Police, and J. Stewart Bottema, Palo Alto Chief Building Inspector, individually and in their official capacities,
Defendants-Appellees.

No. 71-1656

[November 13, 1973]

OPINION

On Appeal from the United States District Court
for the Northern District of California

Before: Merrill and Browning, Circuit Judges, and Anderson, District Judge*

Per Curiam:

Plaintiffs-appellants have brought this action under the civil rights and declaratory judgment statutes, 42 U.S.C. §1983, 28 U.S.C. §§2201, 2202. They challenge as unconstitutional certain zoning laws of the City of Palto Alto, Municipal Code §§18.04.210 and 18.88.050 defining "R-1" or "single family residential" neighborhoods. Section 18.04.210 defines "family" to mean "one person living alone or two or more persons related by blood, marriage or legal adoption, or a group not exceeding four persons living as a single housekeeping unit." Plaintiffs-appellants sue on behalf of themselves as well as all others who constitute groups of unrelated persons in excess of four who inhabit dwellings in "R-1" neighborhoods in the City of Palo Alto. They seek an injunction against enforcement of the ordinances. The District Court denied injunctive relief, finding the ordinances to be constitutional and rendered judgment for defendants-appellees. Its opinion appears at 321 F.Supp. 908. From that judgment this appeal is taken.

On appeal plaintiffs-appellants rely on *Boraas v. Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973), in which case the Supreme Court has noted probable jurisdiction. 42 U.S.L.W. 3213 (1973). In that case the ordinance of the Village of Belle Terre limited occupancy of single family dwellings to traditional

*Honorable J. Blaine Anderson, United States District Judge for the District of Idaho, sitting by designation.

families or to groups of not more than two unrelated persons. This ordinance was held to be a classification unconstitutionally discriminating against unrelated groups in excess of two persons. In our view the opinion in that case expressly serves to distinguish the ordinances in the case before us. Here the District Court noted: "[T]he fact [is] that the average size of even the traditional family is *less* than four members * * *." 321 F.Supp. at 912. In the *Belle Terre* case the court stated, with reference to the ordinance before it:

> "* * * [I]f it were aimed at maintaining population density at the level of traditional family units, it would not limit the number of unrelated occupants to two (2) persons per one-family dwelling, which admittedly is smaller than the size of the average family. Assuming such a purpose, a more permissive ordinance would suffice." 476 F.2d at 817.

For the reasons set forth by the District Court in its opinion we agree that plaintiffs-appellants' attack on the constitutionality of the ordinances must fail.

Judgment affirmed.

Appendix B

United States District Court,
N.D. California

No. C 70-2068

Palo Alto Tenants Union, an unincorporated association, et al.,

vs.

George Morgan, Palo Alto City Manager, William Hydie, Palo Alto Police Chief and J. Stewart Bottema, Palo Alto Chief Building Officer, individually and in their official capacities.

[Dec. 18, 1970]

MEMORANDUM OPINION AND ORDER DENYING INJUNCTIVE RELIEF.

WOLLENBERG, District Judge.

This action, filed on September 25, 1970, is brought under the federal civil rights and declaratory judgment statutes. 42 U.S.C. §1983; 28 U.S.C. §§2201, 2202. It asks that the Court permanently enjoin defendants from "harassing" plaintiffs "under the guise of enforcement or authority" of Palo Alto, California, Municipal Code sections 18.04.210 and 18.88.050. The

Court is further asked to declare the cited ordinances unconstitutional.

These are zoning laws. Like most cities, Palo Alto has zoned certain of its neighborhoods "R-1" or "single family residential". §18.04.210 defines "family" to mean "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit". Plaintiffs sue on behalf of themselves and all others who constitute groups of persons, unrelated within the meaning of §18.04.210, who inhabit dwellings in "R-1" neighborhoods, though the number of persons in each group exceeds four. Plaintiffs claim that these groups "live together as famil[ies], treating themselves and treated by others as family unit[s]". Plaintiffs allege that defendants threaten to enforce the terms of §18.04.210[1] so as to make it impossible for these groups to continue, at least in R-1 neighborhoods, what they contend is a constitutionally protected life-style.

The Court denied plaintiffs' motion for a temporary restraining order, but issued an Order to Show Cause. In response to that Order, the parties submitted extensive briefs and exhibits thereto. Oral argument was had, and it was stipulated that the hearing on plaintiffs' motion for a preliminary injunction would constitute the final hearing on the merits of all claims

[1] §18.88.050 is similar to §18.04.210, and deals with situations where persons falling under the definition of "family" provide room and board for other, unrelated individuals. The net effect of §18.88.050 is to limit the number of unrelated individuals living together in R-1 dwellings.

raised herein. On October 30, the matter was taken under submission, though each party submitted supplementary memoranda, which the Court allowed to be filed on November 12 and 25, 1970.

The State has argued for abstention by this Court, but such a course of action has been traditionally justified only where there has been ambiguity in the interpretation to be given a State or local law. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). The Palo Alto ordinances herein questioned are clearly applicable to plaintiffs, and nothing would be served by waiting for the State courts to reiterate the obvious.[2]

The State also cites 28 U.S.C. §2283, i.e. the general bar to federal court injunctions of state criminal prosecutions already instituted. The argument seems inappropriate here: at the time of the complaint herein, no criminal proceeding had been instituted against the named plaintiffs. There is also some question as to whether the civil rights statutes do not provide an exception to the operation of §2283. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (note 2).

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[2]An entirely different situation would be presented if plaintiffs' constitutional arguments were bound up with questions of statutory interpretation. Not every municipal definition of "family" is as precise as Palo Alto's, and California courts have been receptive to arguments, based on statutory construction, which have been brought by unrelated persons seeking to live in a single family residence. Brady v. Superior Court, 200 Cal.App.2d 69, 19 Cal.Rptr. 242 (1962). But plaintiffs here ground themselves in the Constitution; if they have no right under the federal Constitution to live together where they will, then they have no argument left to them—at least in Palo Alto.

The Court thus reaches the merits. Plaintiffs' argument is that the right of unrelated persons to live together "as a family" in a single dwelling place is an "emanation" of the freedom of association specifically guaranteed by the Bill of Rights. Also invoked is the right to family privacy given such importance by the line of cases beginning with Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Since the rights to privacy and free association have been found "pre-eminent" and "fundamental" to our constitutional scheme, plaintiffs maintain that they cannot be infringed by any statute or ordinance absent a showing by the legislating authority of a "compelling state interest". Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). It is argued that Palo Alto can show no compelling need to limit to four the number of unrelated individuals in an R-1 dwelling, and that this is particularly indicated by the fact that "related" families often consist of more than four persons. This distinction between "related" and "unrelated" family groups is said to violate not only the specific Bill of Rights guarantees mentioned above, but also plaintiffs' more general rights to equal protection and due process of the law.

The Court must preliminarily consider the applicability of Shapiro v. Thompson, *cit. supra.* Traditionally, zoning classifications have received the same deference from the courts as classifications devised to regulate the economy, protect the public health, or effect the collection and disbursement of tax moneys. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct.

114, 71 L.Ed. 303 (1926); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937); see generally Tussman & tenBrock, The Equal Protection of the Laws, 37 Calif.L.Rev. 341 (1949). These classifications have generally been upheld if any state of facts can be conceived which would render the legislative decision reasonable. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

But some classifications, including those promulgated in zoning ordinances, statutes, or referenda, have been deemed "suspect". When a classification discriminates against a racial or religious group, or if it impinges on certain "fundamental interests", it is upheld only if the State demonstrates an overwhelming interest that can be served by no alternative means. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Torao Takahashi v. Fish and Game Comm., 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); Shapiro v. Thompson, *cit. supra.*

Dandridge v. Williams, *cit. supra,* reinforces this dichotomy between those classifications which enjoy every presumption of validity and those which may be said to be unlawful *per se,* unless the State carries an almost insupportable burden of proof. See Romero v. Hodgson, D.C., 319 F.Supp. 1201 (1970). Hence, plaintiffs' argument that theirs is a "fundamental interest" is one the disposition of which is crucial to the instant case.

The Court is not convinced that plaintiffs have demonstrated infringement of their constitutional

right to freedom of association. Plaintiffs have correctly cited the bounds of that right as set forth in past cases: i.e., it includes the right to marry and raise children; to worship God—or not to worship Him—in or out of religious congregation; and to engage in concerted action to achieve political or social goals. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Pierce v. Soc'y of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

Plaintiffs are also correct in observing that a law which barred traditional families from R-1 neighborhoods might well be deemed highly suspect. But there is a long recognized value in the traditional family relationship which does not attach to the "voluntary family". The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings.[3] A zoning law which divided or totally excluded traditional families would indeed be "suspect".

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[3]"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." Griswold v. Connecticut, *cit. supra*, 381 U.S. at page 486, 85 S.Ct. at page 1682, 14 L.Ed.2d 510 (*per* Douglas, J.).

The communal living groups represented by plaintiffs share few of the above characteristics. They are voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation. They are in no way subject to the State's vast body of domestic relations law. They do not have the biological links which characterize most families. Emotional ties between commune members may exist, but this is true of members of many groups. Plaintiffs are unquestionably sincere in seeking to devise and test new lifestyles, but the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs. The right to form such groups may be constitutionally protected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not. To define "association" so broadly, and to apply *Shapiro* so widely, would be to dilute the effectiveness of that special branch of jurisprudence which our tradition has developed to protect the truly vital interests of the citizenry.

The Court must stress what this case is *not*: there is no offer of proof that the ordinances here were devised, or are enforced, so as to discriminate against any group because of its racial, religious or political characteristics. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967). Nor is there a showing that the ordinances challenged operate to totally exclude the indigent or the politically voiceless from the City of Palo Alto. See generally Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan.L.Rev. 767

(1969); see also Southern Alameda Spanish Speaking Organization v. Union City, 9 Cir., 424 F.2d 291 (1970). The ordinances here challenged affect only two of the many zones into which the City has been divided. Unrelated groups of more than four persons may live together in other zones, including those designated for lodging houses, hotels, apartment houses, boarding houses, duplexes, triplexes, and so on. Affidavit of Louis J. Fourcroy, Director of Planning and Community Development, Palo Alto, California.

Finally, there is no showing of warrantless searches, unreasonable prying, or of any inevitability of the "repulsive" investigative tactics which the Supreme Court in *Griswold* found antithetical to the constitutional ideal of individual and marital privacy.

The classification here challenged does not, therefore, impinge upon a "fundamental interest" in such a way as to warrant application of the *Shapiro* standard of substantive due process. It only remains for the Court to judge the due process rationality of these enactments by examining the degree to which they promote the aesthetic, economic, and other legitimate goals of zoning. And having done so, the Court finds the ordinances rational within the meaning of the equal protection and due process clauses of the 14th Amendment.

Zoning laws may properly control population density within given neighborhoods, and this consideration alone might justify an ordinance limiting the number of unrelated persons living in R-1 structures, Calif.Gov't Code, §65850; Brady v. Sup. Ct., *cit.*

supra note 1. It is argued that some traditional families have more than four members, and that "equality" would demand a prohibition of their living together in a single R-1 residence. But given the State's clear interest in preserving the integrity of the biological and/or legal family, and given the fact that the average size of even the traditional family is *less* than four members, the Court sees no arbitrariness in limiting the number of unrelated persons living in an R-1 dwelling, while not so limiting the size of the traditional family in such dwellings. From the standpoint of population density, the ordinances distinguishing between traditional families and groups of unrelated persons do not discriminate between them, save insofar as is necessary to promote clear, and overriding, State interests.

The City has also alleged that large groups of unrelated persons living together in an R-1 dwelling tend to have a greater impact on the neighborhood than do traditional families. Noise, traffic problems, and overloaded parking facilities may tend to result when one-family homes become communal dwellings. This justification for the ordinances cannot be said to be irrational.

Finally, the Court notes the economic rationale offered by the City Attorney in oral argument. Many older neighborhoods have large, once-distinguished town houses which are not owner occupied. Often owners find it more profitable to rent these dwellings, not to single families, but to large groups of unrelated persons with independent sources of income. Such

groups are able to pay, collectively, far more in rent than can traditional families with one, or at best two, wage earners. Thus the rent structure of a whole neighborhood may be affected by opening R-1 zones to large, unrelated living groups. As the rent and property value structure of the neighborhood is changed, single families move out, and the character of the area is altered. Zoning laws, within limits not relevant here, can take account of these economic factors, and this too might provide a rational basis for the classification herein questioned.

The Court finds the ordinances here challenged constitutional. Plaintiffs' motion for preliminary and final injunctive relief is hereby ordered denied. The Clerk of the Court is directed to enter judgment for defendants.

Appendix C

STATUTES INVOLVED

Palo Alto Municipal Code §18.04.160: Dwelling, one family.

> The term "one family dwelling" shall mean a building containing but one kitchen designed and/or used to house not more than one family, including all necessary employees of such family. (Ord. 1324 §4.21, February 19, 1951).

Palo Alto Municipal Code §18.04.210: Family.

> The term "family" shall mean one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit. (Ord. 1324 §4.25, as amended by Ord. 1963, July 25, 1960).

Palo Alto Municipal Code §18.12.020: Uses permitted:

> The following uses shall be permitted in the R-1 district:
>
> (a) One family dwellings, including private garages, accessory buildings and uses, and home occupations.
>
> (b) Agriculture, horticulture, gardening, but not including commercial nurseries, or the raising of rabbits, dogs, fowl or other animals for commercial purposes, or the sale of any products on the premises. (Ord. 1324 §6.02, as amended by Ord. 1382 February 11, 1952, Ord. 1542 May 10, 1954, and Ord. 1717 October 8, 1956).

Palo Alto Municipal Code §18.88.050: Additional uses permitted.

The following accessory uses, in addition to those hereinbefore mentioned, shall be permitted:

(a) The renting of rooms and/or the providing of table board for not more than three paying guests in a dwelling occupied by a family consisting of one person living alone or two or more persons related by blood, marriage, or legal adoption, provided that a family consisting of:

1. Two unrelated individuals may rent rooms and/or provide table board for not more than two paying guests in a dwelling.

2. Three unrelated individuals may rent rooms and/or provide table board for not more than one paying guest in a dwelling.

(b) The operation of necessary service facilities and equipment in connection with schools, colleges, hospitals, and other institutions when located on the site of the principal use.

(c) Recreation, refreshment and service buildings in public parks, playgrounds, and golf courses. (Ord. 1324 §22.05, as amended by Ord. 1963, July 25, 1960).

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1. The decisions of the courts below are in full accordance with the principles enunciated in Village of Belle Terre, et al. v. Boraas, et al., April 1, 1974, No. 73-191, and in fact the ordinance involved herein is more equitable than that upheld in the Boraas case. No conflict between the circuits exists in view of this honorable court's disposition of the Village of Belle Terre v. Boraas, supra 5

2. The court's decision in Village of Belle Terre v. Boraas effectively disposes of petitioners' contention that the important points herein have not been decided by the United States Supreme Court 8

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-1365

PALO ALTO TENANTS UNION and
TERRY KARL, *Petitioners,*

vs.

PALO ALTO CITY MANAGER, CHIEF OF POLICE, and
CHIEF BUILDING INSPECTOR, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The respondents, Palo Alto City Manager, Chief of Police, and Chief Building Inspector, respectfully pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 13, 1973, be denied.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is reported at 487 F.2d 883 (9th Cir. 1973), and is set forth in full as Appendix A to petitioners' petition on file herein. The memorandum opinion and order of the United States District Court for the Northern District of California is reported at 321 F.Supp. 908 (N.D. Cal. 1970), and is set forth in full as Appendix B to petitioners' petition on file herein.

QUESTION PRESENTED

Whether Palo Alto's definition of a family as including persons related by blood, marriage, or legal adoption, and, as an equivalent thereto, up to four persons not so related, for purposes of application of the City of Palo Alto's zoning ordinance, meets constitutional standards of due process and equal protection as contained in the Fourteenth Amendment of the United States Constitution?

STATUTES INVOLVED

The legislation involved herein is Palo Alto Municipal Code Sections 18.04.160, 18.04.210, 18.12.020, and 18.88.050, which are set forth in Appendix C to petitioners' petition of file herein.

STATEMENT OF THE CASE

Petitioners, alleging sufficient capacity to give them standing, filed an action in the United States District

Court for the Northern District of California alleging that Palo Alto's definition of a family, which included an equivalent of up to four persons not related by blood, marriage or legal adoption, for purposes of determining a permissible number of occupants of single-family residences in the City, was unconstitutional on a number of grounds, principally violations of equal protection and due process under the Fourteenth Amendment of the United States Constitution.

The District Court, the Honorable Albert C. Wollenberg presiding, denied all relief requested and declared that the definition of a family and its unrelated person equivalent for purposes of applicability in single-family residence zones in the City of Palo Alto met all constitutional standards.

The case is reported at 321 F.Supp. 908. The principal holding of Judge Wollenberg may be summarized as follows:

1. The test to be applied to an ordinance of this type is the rational basis or "police power" test and not the compelling interest test as urged by petitioners.
2. Under the test applied, the ordinance in question bears a rational relationship to the governmental purposes of controlling population density, noise, traffic, parking, maintenance of the rent structure, and preservation of single-family neighborhoods from intrusion of other types of dwelling units.
3. An influx of individuals able to pay collectively far higher rents than a traditional family can

afford would have an adverse upward effect upon traditional families and would tend to create a windfall for landlords.

4. The traditional family has biological and legal ties which differ considerably from those applicable to non-related persons, and thus the State may legislate toward them differently than toward non-related persons.
5. No racial, religious or political discrimination was shown. No right of free association was infringed.

The United States Court of Appeals for the Ninth Circuit affirmed, 487 F.2d 883, distinguishing Palo Alto's more liberal ordinance from the restrictive one found defective by the Second Circuit in *Boraas v. Village of Belle Terre,* 476 F.2d 806. The Court noted that Palo Alto's ordinance, by actually allowing four unrelated persons to occupy a dwelling unit, exceeded the average size of traditional families in Palo Alto (3.75 persons) and thus the constitutional infirmity present in the Belle Terre ordinance was not pr nt.

The instant petition for a writ of certiorari followed, and during its pendency before this Court but prior to submission of respondent's brief in opposition, this honorable Court reversed the decision of the Court of Appeals for the Second Circuit in the case of *Village of Belle Terre, et al. v. Boraas, et al.,* No. 73-191, April 1, 1974.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. THE DECISIONS OF THE COURTS BELOW ARE IN FULL ACCORDANCE WITH THE PRINCIPLES ENUNCIATED IN VILLAGE OF BELLE TERRE, ET AL. v. BORAAS, ET AL., APRIL, 1974, NO. 73-191, AND IN FACT THE ORDINANCE INVOLVED HEREIN IS MORE EQUITABLE THAN THAT UPHELD IN THE BORAAS CASE. NO CONFLICT BETWEEN THE CIRCUITS EXISTS IN VIEW OF THIS HONORABLE COURT'S DISPOSITION OF THE VILAGE OF BELLE TERRE v. BORAAS, SUPRA.

Even prior to this honorable Court's decision in *Village of Belle Terre v. Boraas,* April 1, 1974, No. 73-191, insufficient grounds for granting the requested writ of certiorari existed. In the first place, the United States Court of Appeals for the Ninth Circuit clearly found that the ordinance in force in the City of Palo Alto was so closely akin in its allowance of four unrelated persons as an equivalent of a family that it did not possess the constitutional infirmity found defective in *Boraas v. Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973).

This honorable Court's decision in *Village of Belle Terre v. Boraas, supra,* dispelled all doubt and, in addition, effectively disposed of any claim that there was a conflict between the decisions of the Second Circuit and Ninth Circuit regarding occupancy limitation by way of definitions of a family.

The Court will recall that it upheld a definition of a family very closely similar to Palo Alto's in *Village of Belle Terre v. Boraas, supra,* except that in that case the equivalent of unrelated persons was set at two, while in Palo Alto it is set as four, which actually exceeds the average number of persons occupying a residential dwelling unit.

The Honorable Justice William O. Douglas, writing for the majority of the Court, rejected the various alleged infirmities of the ordinance in the *Village of Belle Terre* by noting:

> "It is not aimed at transients. Cf. *Shapiro v. Thompson,* 394 U.S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin v. Illinois,* 351 U.S. 12. It involves no 'fundamental' right guaranteed by the Constitution, such as voting, *Harper v. Virginia Board,* 383 U.S. 663; the right of association, *NAACP v. Alabama,* 357 U.S. 449; the right of access to the courts, *NAACP v. Button,* 371 U.S. 415; or any rights of privacy, cf. *Griswold v. Connecticut,* 381 U.S. 479; *Eisenstadt v. Baird,* 405 U.S. 438, 453-454. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415) and bears 'a rational relationship to a [permissible] state objective.' *Reed v. Reed,* 404 U.S. 71, 76."

Later, Justice Douglas stated:

> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within

Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."

Little more need be said by respondents. If an ordinance creating an equivalent of a family of two persons not related by blood, marriage or legal adoption is constitutionally permissible as found in *Village of Belle Terre v. Boraas, supra,* then surely an ordinance allowing twice as many persons not so related is clearly beyond reasonable dispute as to its validity.

The only other case cited by petitioners in support of their petition is the State case of *City of Des Plaines v. Trottner,* 34 Ill.2d 432, 216 N.E.2d 116 (1966). This case is clearly inapplicable to the facts in the instant case, inasmuch as the validity of the ordinance there involved was determined by the nonexistence of a state enabling statute. This issue has not been raised with regard to Palo Alto's ordinance and, indeed, it could not, as the California authority to enact such an ordinance (subject to constitutional standards) is beyond dispute. If Illinois authority on the issue on this case is of interest, the Court is respectfully referred to the case of *Drueck v. Peterson* (1950) 340 Ill.App. 164, 91 N.E.2d 124, in which a cooperative living group, nearly all of whom were unmarried, were found by the Illinois court not to be a family residence use and thus not permitted to occupy a single-family residence.

2. THE COURT'S DECISION IN VILLAGE OF BELLE TERRE v. BORAAS EFFECTIVELY DISPOSES OF PETITIONERS' CONTENTION THAT THE IMPORTANT POINTS HEREIN HAVE NOT BEEN DECIDED BY THE UNITED STATES SUPREME COURT.

As the second rationale supporting petitioners' request for a writ of certiorari, the claim is made that this honorable Court has not decided an issue of importance in many areas of the United States. This contention has now, of course, become moot in view of this honorable Court's decision in *Village of Belle Terre v. Boraas, supra,* and need not be discussed herein.

CONCLUSION

Since *Village of Belle Terre v. Boraas* was decided on April 1, 1974, and involves issues so closely akin herein, but nevertheless upheld an ordinance more restrictive than that of Palo Alto's, it is clear that the writ of certiorari requested in this case prior to the rendering of the decision in *Village of Belle Terre v. Boraas, supra,* should be denied. Respondents respectfully so urge.

Dated, Palo Alto, California,
April 26, 1974.

Respectfully submitted,
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Attorney for Respondents.